2010

Salt Lake City v. Keith Street : Reply Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH Plaintiff-Appellee, vs. KEITH STREET, Defendant-Appellant.	Case No. 20100203

REPLY BRIEF OF APPELLANT

THIS IS THE REPLY BRIEF OF APPELLANT IN AN APPEAL FROM A CONVICTION AND SENTENCE FOR DRIVING UNDER THE INFLUENCE, A CLASS A MISDEMEANOR OFFENSE UNDER UTAH CODE ANN. § 41-6a-502 (1973 AS AMENDED)

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SUMMARY OF THE ARGUMENT

Mr. Street was charged with Driving Under the Influence of Alcohol, a class A misdemeanor, in violation of Utah Code Ann. § 41-6a-502. He filed a motion to suppress the evidence at the trial level arguing that the anonymous tip provided to police was insufficient to support a reasonable suspicion to stop and detain him. In analyzing the issue at the trial level, both Mr. Street and the City argued and submitted memoranda addressing the three-part test outlined by this Court in *Kaysville City v. Mulcahy*, 943 P.2d 231 (Utah App. 1997). Mr. Street contends that the City, for the first time, argued that the three-part test outlined in *Mulcahy*, should be abolished in favor of a broader totality of circumstances test. As explained below, Mr. Street contends that the City failed to preserve that issue for review at the trial level and therefore, this Court should not entertain that argument.

The City also contends that the Utah Supreme Court eliminated the *Mulcahy* three-part test for analyzing anonymous tips. As also argued below, Mr. Street asserts that the Utah Supreme Court has not abolished the three-part test for analyzing anonymous tips, and has

instead applied the *Mulcahy* analysis in *State v. Roybal*, 232 P.3d 1016 (Utah 2010).

I. THE CITY FAILED TO PRESERVE FOR REVIEW IN THIS COURT THE ARGUMENT TO ABANDON THE THREE-PART MULCAHY TEST.

"As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. A party cannot circumvent that rule by "mere[ly] mention [ing] ... an issue without introducing supporting evidence or relevant legal authority"; such a "mere mention" "does not preserve that issue for appeal." *State v. Brown*, 856 P.2d 358, 361 (Utah Ct.App.1993) (internal quotations omitted). The preservation requirement is based on the premise that, "in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it." *Holgate*, 2000 UT 74 at ¶ 11, 10 P.3d 346 (internal quotations omitted). Accordingly, an objection "must at least be raised to a level of consciousness such that the trial [court] can consider it." *Brown*, 856 P.2d at 361 (internal quotations omitted).

"As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." *State v. Brown*, 856 P.2d 358, 359 (Utah Ct.App.1993). In order to preserve an issue for appeal, it "must be raised in a timely fashion, must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority." *State v. Schultz*, 2002 UT App 366, ¶ 19, 58 P.3d 879 (quotations and citations omitted). "The trial court is considered 'the proper forum in which to commence thoughtful and probing analysis' of issues." *Brown*, 856 P.2d at 360 (citation omitted). The preservation rule allows "the trial court

an opportunity to 'address the claimed error, and if appropriate, correct it.' " *State v. Cram*, 2002 UT 37, ¶ 10, 46 P.3d 230 (*quoting State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346). Additionally, "[f]ailing to argue an issue and present pertinent evidence in that forum denies the trial court 'the opportunity to make any findings of fact or conclusions of law' pertinent to the claimed error." *Brown*, 856 P.2d at 360 (citation omitted).

At the trial court level, the City never argued for rejection of the three-part *Mulcahy* test in favor of a totality of the circumstances analysis. On the contrary, in its Supplemental Memorandum In Opposition to Defendant's Motion to Suppress (hereinafter "City's Memorandum"), the City identified the proper test to apply to an analysis of an anonymous tip as the "three factor test" articulated in *Kaysville City v. Mulcahy*, 943 P.2d 231, 233 (Utah App. 1997). The City then set forth argument addressing each prong of the test and contended that application of the three-part test here supported their position. Likewise, at oral argument, the City again "[m]aintained its position under Mulcahey(sic)" in arguing that application of the three-part test support their position.[1]

Given the state of the record, Mr. Street contends that the City failed to preserve this argument for appeal.

II. THE UTAH SUPREME COURT DOES NOT REJECT THE MULCAHY THREE-PART TEST IN FAVOR OF A TOTALITY OF THE CIRCUMSTANCES APPROACH IN ANONYMOUS TIP CASES

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[1] The trial court, at oral argument, admittedly asked defense counsel if it was appropriate to "reject the three-prong approach from Mulcahey(sic) . . . in favor of the flexible approach offered by the totality of circumstances test . . . ." Neither party, however, briefed the issue and the City never affirmatively argued the point. *State v. Brown*, 856 P.2d 358, 361 (Utah Ct.App.1993)("mere[ly] mention [ing] ... an issue without introducing supporting evidence or relevant legal authority" does not preserve that issue for appeal.")

In its brief, the City contends that Utah Supreme Court rejected the *Mulcahy* analysis in two cases, *State v. Roybal*, 232 P.3d 1016 (Utah 2010) and *State v. Saddler*, 104 P.3d 1265 (Utah 2004), in favor of a totality of circumstances analysis in reasonable suspicion anonymous tip cases. While the Supreme Court describes the analysis as a totality of circumstances review, it is clear that the Court applied *Mulcahy* factors in *Roybal*, while the facts of *Saddler* do not apply to this case.[2]

A review of the *Roybal* decision reveals that the Utah Supreme Court analyzed the tip in conformance with the *Mulcahy* factors and even ends its analysis with a favorable citation to *Mulcahy*:

> Looking to the totality of the circumstances in the instant case, we believe the 911 call was sufficient to provide the dispatcher with reasonable suspicion that Roybal was driving under the influence. Irrespective of the fact that McCaine was Roybal's live-in girlfriend, she was an identified citizen-informant who is presumptively reliable. Her personal involvement with Roybal, on its face, neither weakens, nor strengthens, that presumption; we must consider the unique facts of this case. She gave her full name and address, thereby fully exposing herself to liability for fraudulent allegations. Further, she did not call with the intention of reporting Roybal's drunk driving but to request help removing him from her home. Her statement that Roybal had been drinking was made off-handedly and with the acknowledgment that she, too, had been drinking, which indicates that her remark was simply a statement of fact and lacked an ulterior motive. In addition, she provided specific details of her first-hand observations. McCaine reported to the dispatcher that she had been with Roybal, that they had been drinking together, and that he had just left. She also described his vehicle with partial license plate number, the area he was in, and the direction he was heading. Coupled with the fact that McCaine was noticeably intoxicated on the phone, the dispatcher could make the reasonable inference that Roybal was similarly

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[2] Unlike this case, *Roybal* involved a known, identified informant, Roybal's girlfriend, who observed Roybal in a face-to-face encounter, described how both parties had consumed alcohol and were intoxicated and detailed the vehicle and location where Roybal had driven his vehicle.

> intoxicated, and was driving. Unlike the court of appeals, we do not believe that it was necessary for McCaine to report how much or how long Roybal had been drinking, the type of drink consumed, or his weight. Undoubtedly these details would have strengthened the report. However, because McCaine said Roybal had been drinking with her, and she was clearly intoxicated, it was reasonable for the dispatcher to infer that Roybal was likewise intoxicated. Thus, the details provided in the call, together with their reasonable inferences, given from a reliable, identified citizen-informant, were sufficient for the dispatcher to form a reasonable suspicion that Roybal was driving while intoxicated..
>
> Once a reasonable suspicion is reached by the originator of the information-in this case, the dispatcher-the responding police officer is entitled to rely on the information unless the officer's personal observations or interaction with the suspect present indications to the contrary. That is to say, if the suspect's actions are not inconsistent with the reasonable suspicion, the police officer may pursue the suspect and stop him or her immediately. **See Kaysville City v. Mulcahy, 943 P.2d 231, 234 (Utah Ct.App.1997)** ("An officer receiving a dispatched message may take it at face value and act on it forthwith." (internal quotation marks omitted)).(emphasis added)

State v. Roybal, 232 P.3d 1016, 1023-24 (Utah 2010).

In *Saddler*, the Utah Supreme Court was asked to decide whether the *Mulcahy* factors should be extended to analyzing probable cause determinations when police rely upon confidential informants to obtain search warrants. There are vast differences between police officers articulating probable cause elements in a search warrant affidavit, which is reviewed and analyzed by a magistrate, and a reasonable suspicion determination based simply on information given to police by an anonymous informant. In the search warrant case, a more flexible approach is necessary for at least two reasons:

> 1. "'Affidavits' are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements have no proper place in this area;" and

2. "[G]iven the informal often hurried context in which it must be applied, the built in subtleties of a formal test are particularly unlikely to assist magistrates in determining probable cause."

Saddler, 104 P.3d at 1268.

The anonymous tip analysis in a reasonable suspicion case is very different. First, police often develop probable cause determinations over time, often with the help of confidential informants.[3] Unlike reasonable suspicion decisions, police must first obtain permission from a neutral magistrate, who can question the officer about the reliability of the informant. Anonymous informant information in the context of reasonable suspicion determination has no such neutral determination. Rather, police who act on the information, make the unilateral determination about reasonable suspicion based on what is reported to them, without review by a neutral magistrate. The *Mulcahy* analysis was developed to give courts guidance when analyzing anonymous informant, reasonable suspicion tip cases. That test properly weighs anonymous information with detail necessary to support a stop, while also giving police necessary flexibility to make reasonable suspicion stops when they confirm or corroborate information provided by the informant. This Court should maintain that analysis because it gives courts the flexibility to evaluate reasonable, commonsense factors in determining reasonable suspicion, when the information is provided by an anonymous informant.

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[3] *Saddler* is an excellent example of the type and length of investigation resulting in a probable cause affidavit. In *Saddler*, the police officer affiant knew the confidential informant for over one year, observed that the informant had connections in the drug world, received detailed first-hand information from the informant about observation of drugs and drug sales in Saddler's home, and provided detailed information about Saddler's hours of operation. Additionally, the affiant personally observed short term traffic consistent with drug sales and conducted a traffic stop of a vehicle leaving the premises and discovered a personal possession quantity of drugs in the vehicle.

CONCLUSION

Mr. Street requests that this Court reverse the decision of the trial court denying his motion to suppress and remand this case for proceedings consistent with that decision.

Dated this 6th day of October, 2010.

RICHARD P. MAURO
Attorney for Appellant, Keith Street

CERTIFICATE OF DELIVERY

I hereby certify that I have caused to be delivered a copy of the foregoing to the Salt Lake City Prosecutor's Office, 349 East 200 South, Suite 500, Salt Lake City, Utah 84111, this 6th day of October, 2010.